

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

REBEKAH GEE, SECRETARY, LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS
Applicant,

v.

PLANNED PARENTHOOD GULF COAST, *et al.*,
Respondents

REBEKAH GEE'S APPLICATION TO EXTEND TIME
TO FILE A PETITION FOR WRIT OF CERTIORARI

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To the Honorable Samuel A. Alito Jr., as Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

The Louisiana Attorney General, on behalf of Rebekah Gee, Secretary, Louisiana Department of Health and Hospitals, respectfully requests an additional sixty (60) days to file a certiorari petition to review the Fifth Circuit’s final judgment, issued June 29, 2017, (App. A) from which rehearing was denied November 28, 2017 (App. B). This would extend the deadline from February 26 to April 27, 2018. This application is being filed over 10 days before the petition’s current due date. *See* Rule 13.5. The Court has jurisdiction to review the Fifth Circuit’s judgment under 28 U.S.C. § 1254.

BACKGROUND

This case raises an issue of national importance: whether Medicaid’s Free Choice of Provider provision (42 U.S.C. § 1396a(a)(23)) authorizes a private right of action for a Medicaid recipient to challenge the merits of a state’s decision to disqualify or decertify a provider from the pool of state-approved Medicaid providers. A sharply divided Fifth Circuit¹ found it does so, flatly disregarding the Supreme Court’s binding precedent in *O’Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980), which held that the Free Choice of Provider provision “gives recipients the *right to choose among a range of qualified providers*,” but “it clearly does not confer . . . a right on a recipient to continue to receive benefits” from a provider who “has been determined to be unqualified.” *Id.* at 785 (italics in

¹ App. A, Panel Opinions, Judges Wiener and Prado, with Judge Owen in Dissent. App. B, Order on Petition for Rehearing *En Banc*, seven judges voting in favor of rehearing *en banc* and seven voting against.

original). The decision has enormous impact – to fiscal and federalism concerns. In the Fifth Circuit alone, based upon Medicaid/CHIP enrollment, this ruling exposes three states to more than *6.7 million new private rights of action* in federal court, in complete circumvention of administrative remedies provided under state law.²

In addition to ignoring binding precedent, the Fifth Circuit’s decision has created a split in the circuits. Most recently, in *Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017), the Eighth Circuit determined that Medicaid recipients do not have a private right of action under § 1983 to challenge a state’s disqualification of a Medicaid provider pursuant to the Free Choice of Provider provision because the provision does not create an enforceable federal right. Similarly in *Kelly Kare, Ltd. v. O’Rourke*, 930 F.2d 170 (2d Cir. 1991), the Second Circuit held that Medicaid recipients do not have a vested right to choose a nursing home that is being decertified as a health-care provider.

This decision poses far-reaching negative consequences for states attempting to administer the Medicaid program by effectively sanctioning interlocutory federal review of state-run administrative proceedings required, ironically, by the Medicaid Act itself as a means of providing due process for providers facing adverse action. As demonstrated by the context of this case, the Fifth Circuit’s decision permits a provider facing adverse administrative action to recruit recipients to file a federal lawsuit to adjudicate the merits of disqualification decisions and, thus, avoid state

² <https://www.medicare.gov/medicaid/by-state/by-state.html> (last accessed January 24, 2018).

administrative proceedings altogether. Clearly, such a result is contrary to established law and jurisprudence.

REASONS FOR GRANTING AN EXTENSION OF TIME

The State requests an additional 60 days to file a certiorari petition for the following reasons. First, the United States Department of Health and Hospitals (“DHH”) is in the process of issuing additional guidance pertaining to Medicaid’s Free Choice of Provider provision. To this end, it has asked for input from states, including the State of Louisiana. Just this week, HHS withdrew prior guidance on this issue. See <https://www.medicaid.gov/federal-policy-guidance/downloads/smd18003.pdf>. (SMD#18-003, issued January 18, 2018, Rescinding SMD#16-005 Clarifying “Free Choice of Provider” Requirement). A sixty-day extension will allow additional time for DHH to issue guidance that may clarify its position as to issues pending in this matter.

Second, the same issue of national importance whether Medicaid’s Free Choice of Provider provision provides a private right of action, is pending before a potentially different panel³ of the Fifth Circuit in *Planned Parenthood of Greater Texas Family Planning and Preventative Health Services, Inc. v. Charles Smith, in his Official Capacity as Executive Commissioner of HHSC*, No. 17-50282, on appeal from the United States District Court of the Western District of Texas, Austin Division, NO. 1:15-cv-01058. The briefing was completed December 8, 2017, in that lawsuit; thus, the Fifth Circuit may render a decision before April 28, 2017, the

³At the time of filing this application, the Fifth Circuit had not yet assigned a panel to the appeal.

requested deadline to file the certiorari petition in this matter. An additional decision from the Fifth Circuit will provide further insight for the parties and allow refinement of legal arguments.

A sixty-day extension will not prejudice Plaintiffs as Defendant has been preliminarily enjoined from terminating any Medicaid provider agreements with Planned Parenthood Gulf Coast, Inc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Elizabeth B. Murrill., a member of the Supreme Court Bar, hereby certify that:

- (1) an original and two copies of this Application for Extension of Time to File a Petition for Writ of Certiorari were filed by delivering it on January 30, 2018 to a third-party commercial carrier for next-day delivery to the Clerk of this Court, as permitted by Rule 29.2;
- (2) a copy of this Application for Extension of Time to File a Petition for Writ of Certiorari was submitted to the Court's electronic filing system in conformity with Rule 29.7 and the "Guidelines for the Submission of Documents to the Supreme Court's Electronic Filing System"; and
- (2) one copy of the same Application was served as required by Rule 29.3 by delivering it on January 30, 2018 to a third-party commercial carrier for next-day delivery on the following counsel for each separately-represented party:

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An electronic pdf of the Application has been sent to the following counsel via e-mail:

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